UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN FEDERATION FOR CHILDREN, INC.,

and **Case: 28-CS-246878**

SARAH RAYBON, an Individual.

RESPONDENT'S POST-HEARING BRIEF

American Federation for Children, Inc. ("AFC" or the "Respondent"), by and through its undersigned counsel, hereby files its Post-Hearing Brief as follows:

STATEMENT OF THE CASE

The General Counsel alleges AFC violated Sections 8(a)(1) and (4) of the National Labor Relations Act ("the Act") for its reaction to The Complainant's, Sarah Raybon ("Complainant" or "Raybon"), personal attacks against her supervisor Steve Smith ("Smith"). GC Ex. 1(j). It also alleges AFC retaliated against Raybon after her resignation by excluding her from some of its strategy meetings with third parties. *Id*. These allegations are unfounded and contradicted by the evidence presented at the hearing.

As described in detail below, to support these alleged violations, the General Counsel attempts to twist Raybon's baseless accusations that her supervisor was racist into righteous acts to protect her minority coworkers from Smith. Contrary to that spin, those same coworkers instead testified that, after an evening of drinking, Raybon used offensive racial tactics for her personal gain. All testifying co-workers characterized Raybon's acts as selfish and discriminatory; no co-worker testified that Raybon was acting on their behalf or in their interests.

Further, neither the Consolidated Complaint nor any evidence provided by the General Counsel attempts to offer an explanation on why AFC would choose to retaliate against Raybon by excluding her on only certain issue meetings but choose to work with her on other issues. As

shown by the written evidence and extensive testimony, AFC internally considered refusing to work with Raybon at all, but instead decided it would only exclude her when she directly opposed AFC's policies.

In sum, the General Counsel has failed to meet its burden to prove any violation of the Act occurred, and judgment should be entered in favor of AFC.

STATEMENT OF THE FACTS

AFC is a national non-profit education reform organization aimed at providing families access to a quality education. T. 51, 60. AFC advocates for and implements school choice programs across the country. T. 56. At times, AFC will work with similar organizations to direct various forms of tax credits and scholarships toward families to use for their child's education. T. 57. In Arizona, one form of possible education funding is known as an educational savings account ("ESA"). *Id*.

The Complainant was a member of AFC's Arizona State team as the Director of Implementation. T. 75. As the Arizona Director of Implementation Raybon was supervising canvassers in the state.[1] T. 75. Prior to January of 2019, Raybon worked with her mother, Independent Contracted Lobbyist Sydney Hay ("Hay") and Arizona Communications Director Kim Martinez ("Martinez"). T. 74. In late 2018, AFC ended its two-year search for an Arizona State Director. T. 182. Raybon herself was considered for the position but was not chosen because "[s]he did not meet the qualifications threshold for the position, but she was also conflicted out of consideration because we believed it would have been a conflict of interests for her to supervise her mother." *Id.* Upon learning that AFC planned to hire former Arizona State Senator Steve Smith

[1] One such canvasser was Gaby Ascencio, a part time AFC employee supervised by Raybon before Ascencio went on a leave of absence with AFC in 2017 due to her immigration status and expiring visa. T. 186; 225. Ascencio returned to AFC in April 2019 and reports to Raybon's replacement. T. 322.

("Smith") for the position, Raybon agreed with the selection without expressing any misgivings about the hire. T. 182.

Prior to Smith's hiring, AFC was the subject of national negative media attention for the contrast between its Spanish and English flyers. T. 184. In the Summer of 2018 AFC's website had flyers describing which families could be eligible for ESA programs. *Id.* AFC was harshly criticized for the differences between the two versions of the flyers. *Id.* Also prior to Smith's hiring, AFC began sponsoring its former employee, Gaby Ascencio ("Ascencio"), through a fairly complex immigration employment program. T. 223. The program required AFC to list the position for applications for a period of time before AFC would be legally permitted to have Ascencio (who is of Mexican nationality) return to her position as a non-US citizen. T. 557.

Upon his first meeting with the Arizona state team, Smith was informed of the various issues pending with the team including the website language allegations and the employment sponsorship program that was still dragging on. T. 480-81. At this meeting, Martinez raised the ongoing concern regarding the different messages contained in the English and Spanish language used on AFC's Arizona flyers and website.[2] T. 481-82. Smith ultimately agreed with Martinez's recommendation that the two versions be direct translations of each other. T. 483.

Following the initial team meeting with the Arizona State team and Smith, Martinez noted hostility and resentment from Raybon toward Smith. In early January 2019, Smith asked Raybon probing questions on her choice of radio ad buys. T. 484. While Martinez thought this was an important issue to raise, Raybon and Hay ultimately thought Smith was rude and disrespectful for giving push back on Raybon's decisions. T. 485, 567-68. Overall Raybon states her disagreements with Smith started immediately after he was hired. T. 618.

[2] Raybon confirmed Martinez was present for any further conversations about the language used on the website. T. 619.

Immediately after this minor disagreement, in late January 2019, it was brought to AFC President John Schilling's attention that Hay was concerned that Smith's role violated state lobbying laws. T. 77. AFC hired legal counsel to evaluate the accusation. T. 79. This counsel produced a legal memorandum stating that no violation had occurred and gave recommendations for future compliance with relevant legislation. T. 79; GC. 10. Following this memorandum, Hay continued to disagree with the legal conclusion. T. 487, 533-34. Schilling believed this continued objection was because "Ms. Hay simply did not want to report to Mr. Smith." T. 86. Rather than react punitively to anyone bringing these concerns, AFC hired outside legal counsel to observe the Arizona weekly team calls "to keep the peace." T. 86.

The peace did not last. Both Raybon and her mother, Hay, continued to complain about reporting to Smith. Raybon began speaking with her former supervisor Lindsey Rust about Smith and his purported "disrespectful" nature. T. 190. Rust listened to these complaints and concluded Raybon was simply concerned that Smith would have increased control over the team and Raybon's role's importance would be reduced. T. 304, 315. When Rust reported these complaints to Schilling, he was concerned for Raybon and wanted to ensure that no AFC employee was suffering a hostile work environment. T. 190. Neither Raybon nor her mother were disciplined for these concerns or otherwise dissuaded from bringing similar complaints. T. 321.

Given that her complaints over Smith's tone and control of the team as the Director had not worked, Raybon then drastically changed strategies. Specifically, she began claiming Smith was a racist. Specifically, on February 19, 2019 a large portion of AFC's employees attended a national conference in Washington D.C. T. 88. Upon arriving at the airport for the conference, Raybon waited hours to share a cab ride with Valeria Gurr, AFC Nevada State Director. T. 344. The car ride would last only approximately twenty (20) minutes. *Id*. Gurr reported that Raybon approached her at the airport after she (Raybon) had evidently been drinking and began telling

Gurr that Smith "did not like people of color." T. 345. As a woman of color, Gurr became immediately uncomfortable with the cavalier nature of the accusations and because she did not know Smith. T. 347, 350.

Upon arriving at the hotel, Raybon followed Gurr into her hotel room. *Id.* In her room, Gurr repeatedly asked Raybon to talk to someone else about her concerns because Gurr was uncomfortable. T. 347-48. Instead, Raybon followed Gurr to another group of AFC employees and repeated the claims that Smith "was a racist." T. 348. The only supporting evidence Raybon gave this group of employees was reference to an Arizona law Smith had voted on several years prior. T. 349. The group immediately became uncomfortable with Raybon's actions and some even left the table. *Id*. Gurr clarified she did not disagree with employees discussing racism in the workplace but that, "[Gurr] would appreciate it if they would go to your supervisor with real proof. Not after margaritas in a hotel in front of everybody else. And especially not in front of people that has (sic) suffered enough from that." T. 351-52. Gurr went on to explain, "… it felt like gossiping…," "[i]t was gossip." T. 341, 349.

Gurr immediately discussed the incident with Martinez and complained that Raybon had "talked [Gurr's] ear off, from the airport, through the Uber ride, to the hotel, and followed her into her hotel room, talking about how [Smith] is a racist and doesn't like brown people." T. 493. Both Gurr and Martinez then saw Raybon approach minority AFC employees at the dinner, then bring them outside the main dinning room for a conversation. T. 343, 353, 491-92. Due to Raybon's comments that "she was on a mission to talk about this, and it was to get this guy from Arizona," Gurr understood Raybon was targeting each minority employee at the conference to spread the rumor that Smith is a racist. T. 347-348. Three employees approached by Raybon at the dinner

then spoke to Martinez about the interaction.[3] T. 492. Martinez ultimately was so offended by Raybon's actions she described the acts as "prey[ing] on the Hispanics that work for the organization, and try[ing] to get them to carry her water because [Raybon] didn't like the change of leadership or the addition of leadership in Arizona." T. 494-95.

While still at the conference, three AFC Employees, including Gurr and Martinez, approached John Schilling at separate times to report that Raybon had accused Smith of "being a racist." T. 89, 343, 493-94. Gurr stated she chose to approach Schilling because she was offended as a first-generation immigrant by Raybon's actions and knew the organization took racial matters seriously. T. 353.

Upon first learning of Raybon's actions Schilling immediately met with her to ask if she was in fact accusing Smith of "being a racist." Schilling explained that three employees had approached him and told him Raybon had accused Smith of being a racist. T. 92. He then asked Raybon if this was true and why she would say so. T. 91. Raybon denied ever using the term "racist," but maintained that Smith was hostile to Hispanics because of legislation he had worked on nearly a decade prior and because she believed Smith was allegedly soliciting resumes for a position that was to be filled by a Hispanic employee (i.e., Ascencio's role). T. 93. Raybon then expressed concerns regarding how Smith spoke to her and his general style. T. 97. Schilling stated AFC would not tolerate a hostile work environment and that he would speak with Smith about his tone. *Id*. Raybon then asked Schilling not to speak with Smith about the allegations. *Id*.

In the following days, Darrell Allison ("Allison"), AFC Vice President of Government Affairs and State Teams, received an email from Smith, his direct report. GC 38. Raybon's fellow employees had reported her accusations to Smith. T. 499; GC 38. Smith believed the accusations

[3] While Raybon and Martinez both worked directly under Smith, and Martinez is Hispanic, Raybon did not approach Martinez with her accusations against Smith. T. 496. In fact, Raybon specifically asked Gurr ***not*** to discuss the allegations with Martinez. T. 497.

were not just false, but a bad faith plot intended to discredit him. *Id*. Smith further believed that Raybon's actions were slanderous and a form of harassment. *Id.* As a minority employee of AFC, Allison was immediately concerned by Raybon's accusations of racism, but was unconcerned with Raybon's other complaints. T. 281. Upon reviewing the email, Allison forwarded the communication to Schilling. T. 103.

Upon receiving this email written by Smith, Schilling then followed up with the three employees that originally approached him and three other employees Schilling was aware had been approached by Raybon at the conference. Specifically, Schilling asked the employees if Raybon had directly stated Smith was "racist" and for the proof she gave for the accusation. T.343-34. Schilling did not inquire into any other allegations made against Smith. T. 107.

Schilling concluded Raybon's accusations were baseless and defamatory. GC 20. Further, Martinez stated she could no longer work with Raybon due to what she believed was Raybon's racist actions- - i.e., attempting to use the protected class of others as a white woman to meet Raybon's own professional desires. GC. 38; T. 500. AFC Chief Financial Officer Jennifer Miller and Schilling then spoke again with Raybon on February 25, 2019. T. 108. In this meeting they informed Raybon of the conclusion that her allegation concerning racism was made in a bad faith attempt to smear Smith's name. GC. 20. T. 109. As they discussed these issues with Raybon, she announced she was resigning. *Id*. Later that evening, she emailed Schilling a written resignation. *Id.;* GC. 15, 16. At no time during that meeting was Raybon told that AFC intended to terminate her employment.[4] T. 207.

[4] As discussed below, Raybon's version of this event differs slightly. Raybon claims Schilling stated "what am I supposed to do Sarah" before she offered her resignation. T. 598.

Raybon's Post-Resignation Activities

One of AFC's primary goals is to promote Education Spending Accounts ("ESAs"), including in the state of Arizona. T. 164. It was AFC's conclusion that one politician in the state, Superintendent Hoffman ("Hoffman"), was opposed to the ESA program and other AFC priorities. T. 164, 415-16. Following her resignation, Raybon continued to work on school choice issues with another organization. AFC's first discussion about Raybon's work after her resignation was concerning Raybon's support of Hoffman and her apparent opposition to AFC's goals. GC 18. AFC was particularly concerned that, on social media, Raybon openly supported Hoffman's position on ESAs and mocked anyone opposed to Hoffman's position on the issue. GC. 45. In addition to Raybon's public support for politicians opposed to AFC, legislators and AFC allies also indicated that Raybon was working to undermine AFC's legislative priorities. T. 163. For this reason, AFC chose not to invite Raybon on calls or strategy meetings concerning ESAs. T. 170. However, the organization was willing to work with Raybon on other matters where their respective goals were in alignment, which it did several times. T. 170, 408.

Schilling expressed the difficulty of advocating for AFC's goals while Raybon's Complaint against AFC was pending.

> We were very concerned about appearing as if we were retaliating against Ms. Raybon, and yet, we were, we were [sic] in a difficult position because they were interfering with our work on policy, legislation, and election matters in the state. So we had a lot of internal discussions about what to do.

T. 154. To address this issue, Schilling directed Smith to avoid discussing Raybon's NLRB Complaint or anything related to this action with AFC's coalition allies. GC. 25.

AFC's Handbook

In January 2021, AFC implemented changes to its employment handbook. GC. 7. The relevant portions state:

CONFIDENTIALITY

Every employee is responsible for protecting any and all information that is used, acquired, or added to regarding matters that are confidential and proprietary of AFC including but not limited to client/donor lists, client/donor information, accounting records, work product, production processes, business operations, computer software, computer technology, marketing and project development operations, to name a few. Confidential information will also include information provided by a third party and governed by a non-disclosure agreement between AFC and the third party. Access to confidential information should be disclosed on a "need to know" basis and access must be authorized by management. Any departure from this policy shall be grounds for disciplinary and legal action. Employees will be asked to sign a confidentially agreement to protect the proprietary information, including but not limited to databases and any information of strategic value to the organization.

SOLICITATIONS AND DISTRIBUTION OF LITERATURE

It is the intent of AFC to maintain a proper business environment and to prevent interference with work and inconvenience to others from solicitations and/or distribution of literature.

Group meetings for solicitation purposes, distributing literature or circulating petitions during work hours is prohibited unless it is approved as an organization-sponsored event. The following guidelines will apply throughout the organization:

- Employees will not engage in any solicitation of other employees for any purpose whatsoever during working hours.
- Certain types of information may be posted on AFC's bulletin board. The President or CEO will approve and post all information that is displayed on the organization bulletin board.

OPEN DOOR POLICY

AFC strongly believes in an open-door, open-communication policy and feels it is an important benefit for all employees. This policy, we believe, will allow an employee to come forward and discuss problems with his or her supervisor to resolve issues quickly and efficiently. However, if an employee's supervisor is not able to satisfy the questions regarding the interpretation or application of this manual or any other workplace issue, then employees are free to contact the next higher level of supervision, President and/or CEO, or the Chief Financial Officer. If an employee has or foresees a problem that may interfere with that employee's ability to adequately perform his or her responsibilities, the employee should discuss the matter with the President or his or her designee.

EQUAL OPPORTUNITY EMPLOYER

> Any employee who feels that a violation of this policy has occurred should bring the matter to the immediate attention of his or her supervisor. An employee who is uncomfortable for any reason in bringing such a matter to the attention of his or her supervisor shall report the matter to the President, Chief Executive Officer (CEO) or Chief Financial Officer (CFO). AFC will investigate all such allegations and prohibits any form of retaliation against any employee for making such a complaint in good faith. An employee who feels subjected to retaliation for bringing a complaint of harassment or participating in an investigation of harassment should bring such matter to the attention of his or supervisor, the President, CEO or CFO.

ARGUMENT

The General Counsel alleges AFC terminated Raybon, by way of constructive discharge, for her conduct at its February 19, 2019 conference and this termination violates section 8(a)(4) of the Act. To prove its allegation, the General Counsel is required to establish "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," at which point, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981). Proof of animus toward the protected conduct is an essential element in establishing that the challenged action was unlawfully motivated. *Whirlpool Corp*., 337 NLRB 726, 726 (2002). To meet its burden, the General Counsel must submit evidence that is "substantial, not speculative, nor derived from inferences upon inferences." *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 639 (5th Cir. 2003).

The General Counsel also alleges AFC later retaliated against Raybon in violation of § 8(a)(1) of the Act. To establish that an employer's actions constitute retaliation in violation of § 8(a)(1) of the Act, the charging party must show "under all of the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees" from engaging in activity protected by Section 7 of the Act. *N.L.R.B. v. Air Contact Transp. Inc.*, 403 F.3d 206, 212 (4th Cir. 2005) (quoting *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir.1997); *see also*

Flagstaff Med. Ctr., Inc. v. NLRB, 715 F.3d 928, 930-31 (D.C. Cir. 2013); *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 830 (7th Cir. 2005).

The General Counsel can meet neither of the above standards, and judgment should be entered in favor of AFC.

A. Raybon's Personal Attacks Were Not Protected Activity.

The General Counsel opened the hearing in this matter claiming Raybon's actions were to raise concern for an AFC supervisor "potentially acting based on anti-immigrant biases." T. 20. Tellingly, only Raybon herself supports this claim, and she offers no credible evidence of such bias. Further, ***every*** AFC employee called by the General Counsel to discuss what Raybon said, and to whom, directly counters Raybon's self-serving story. In truth, it is evident that Raybon simply did not like Smith and did not like working under him as a direct report. Within days of meeting Smith, Raybon complained of his hands on approach and his management style. These complaints were met with sympathy, but the problem (from Raybon's perspective) remained – i.e., Smith remained the State Director over Raybon. So Raybon took a different approach and began her "mission" to spread baseless rumors about Smith to AFC's minority employees.

In order for Raybon's "mission" at AFC's February 19th conference to be considered concerted activity, it must have been "directed toward ending alleged discriminatory employment practices." *Frank Briscoe, Inc. v. N.L.R.B.*, 637 F.2d 946, 950 (3d Cir. 1981). Further, this activity must be "for mutual aid or protection." *See Halstead Metal Prod., a Div. of Halstead Indus., Inc. v. N.L.R.B.*, 940 F.2d 66, 69 (4th Cir. 1991) *citing Joanna Cotton Mills Co. v. NLRB,* 176 F.2d 749, 752-53 (4th Cir. 1949). While at the hearing the General Counsel and Ms. Raybon clearly attempted to shoehorn her actions to meet the standards of concerted activity, this transparent attempt requires broad leaps in logic and ignoring the entirety of her coworker's testimony.

Indisputably, AFC decided to terminate Raybon for her baseless comments regarding her supervisor during AFC's 2019 national conference.[5] GC. 20. T. 109. The stark difference between what those comments were and the purpose behind them demands weighing each witness's credibility. On one hand, Raybon claims she was deeply concerned about AFC receiving a single application for a position being held for a former employee, Ascencio, changes to AFC's website translations, and about legislation her supervisor helped passed nearly a decade prior. To address these concerns Raybon claims she never used the term "racist" but simply raised these issues about Smith so that someone would "stand up for [Ascencio]" and otherwise making other employees aware that Ascencio's sponsorship could potentially be "derailed." T. 646-649.

On the other hand, Raybon's coworkers and supervisors testified that outside of the national conference Raybon did inquire about Ascencio's sponsorship and was repeatedly told Smith had not made ***and could not make*** any decision that would impact Ascencio rejoining AFC.[6] T. 233. However, upon reaching the conference, Gurr and Martinez testified that Raybon repeatedly targeted minority employees to claim, "Steve is a racist," and "[Smith] is a racist and doesn't like brown people." T. 89, 343, 493-94. Gurr specifically noted Raybon told her, "[Smith] doesn't like people of color. He's not very friendly to people of color. And she said it like that. So it was, I was uncomfortable with the whole thing." T. 349. Of all the witnesses called to testify, only Raybon stated she took a measured approach to these conversations with her coworkers.

[5] As discussed below, Raybon was not terminated but instead resigned. Regardless, AFC did decide to terminate Raybon prior to her resignation for lawful reasons.

[6] While the General Counsel appeared at hearing to dispute the supervisory status of Martinez and Gurr, it failed to meet its burden to establish this status. The burden of establishing supervisory status is on the party asserting such status. *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 711 (2001); *Shaw Inc*., 350 NLRB 354, 355 (2007). Any absence of evidence is construed against the proponent of supervisory status. *Community Education Centers, Inc*., 360 NLRB 85, 90 (2014); *Elmhurst Extended Care Facilities, Inc*., 329 NLRB 535, 536 fn.2 (1999).

Every other employee with knowledge of the issue testified that Raybon crassly attacked Smith by calling him a racist, she could not give any real basis for the claim, those crass and baseless comments were reported to Schilling, and it was ***solely*** those unfounded comments that led AFC to the decision to terminate her. GC. 20; T. 89, 343, 493-94.

Raybon's credibility is further in doubt given a Hispanic woman (i.e., Martinez) already worked with her under Smith. While at the hearing Raybon feigned concern over Ascencio and how she would be impacted by Smith's alleged hostility toward Hispanics, notably Martinez testified that Raybon never brought these alleged concerns about Ascencio to her and could not recall ever hearing about Raybon expressing these concerns to anyone else. T. 659.

Further, Martinez directly refuted Raybon's other allegations regarding Smith. Martinez, not Smith, was responsible for the changes to the Spanish and English versions of the website, and Raybon was aware of this decision. T. 481-82, 658-59. In sum, each of Raybon's three alleged supporting facts for her cries of racism are insincere on their face.[7]

Regardless of the credibility determination made, Smith's alleged "viewpoints" are neither actions nor practices. Therefore, Raybon's comments could not have been directed at ending any particular action by Smith. Instead, these claims were made purely out of personal resentment Raybon had with Smith. An employee's accusation against his or her employer of racism out of "personal sentiments" without "any underlying facts justifying" the accusation, is not protected by Section 7. *Media Gen. Operations, Inc. v. N.L.R.B.*, 394 F.3d 207, 212 (4th Cir. 2005). Raybon's actions are therefore not concerted activity as a matter of law, so any reaction to those

[7] The General Counsel also claims that Raybon's accusations of racism are concerted activity because of a healthcare data collection bill Smith and the majority of the Arizona Republican party supported in 2012. GC 42. The bill speaks for itself and inarguably was passed more than 7 years prior to Smith's employment with AFC. Respondent submits there is no possible connection between this bill and working conditions at AFC in 2019, and Raybon's reference to and reliance upon the same underscores the baseless nature of her "racism" allegations.

actions by AFC could not have been in retaliation. In total, the General Counsel has failed to identify ***any*** employment practice engaged in by Smith or AFC that Raybon was particularly seeking to end for others' protection, a fundamental element of protected action.

Lastly, even if Raybon's credibility could be overlooked and the leap made to connect Raybon's concerns over Ascencio to Raybon's offensive comments, the General Counsel ***has still*** failed to meet its burden to prove concerted activity occurred. Either Ascencio was an employee, or she was not. Prior to leaving AFC on leave related to her immigration status, Ascencio reported directly to Raybon T. 186; 225. When Ascencio returned to AFC in April 2019, she reported directly to Raybon's replacement. T. 322. If Ascencio is considered an employee given AFC was actively working to rehire her, then Raybon was her supervisor and not considered an employee under Section 2(3) of the Act. If Ascencio was not an AFC employee, then Raybon's actions were not to end a practice for the mutual protection of her coworkers and therefore not concerted activity. Under any evaluation of the facts presented at hearing, the General Counsel has failed to meet its burden.

B. Raybon Voluntarily Resigned

Regardless if Raybon's "gossip" regarding Smith is considered concerted activity, AFC took no action to terminate or otherwise discipline her. Rather, Raybon indisputably offered an oral and written resignation when confronted with the comments she had made regarding Smith. GC. 15, 16; T. 109. Raybon claims this resignation came after Schilling informed her that Smith would no longer work with her and stated, "what am I supposed to do Sarah?" T. 598. While Respondent denies this statement was made and again references the numerous reasons to doubt Raybon's credibility, even if the question was posed by Schilling, the question does not transform Raybon's resignation into a constructive discharge.

To make such a transformation, the General Counsel must show that Raybon faced a "Hobson's Choice." This doctrine applies only in the narrow circumstances where an employee is confronted with a "clear and unequivocal" choice of remaining employed or foregoing fundamental Section 7 rights. *ComGeneral Corp*., 251 NLRB 653, 657-658 (1980). The Board has applied the doctrine when an employee "quits rather than comply" with the employer's unlawful condition. *Intercon I (Zerom),* 333 NLRB 223 (2001).

Even assuming Schilling did pose the question "what am I supposed to do," Raybon faced no such clear choice. According to Raybon's testimony, the question came after Schilling detailed that he was again told Raybon had violated the AFC handbook by calling Smith a racist. T. 640. The General Counsel and Raybon both submit that she never said the word racist. Therefore, Schilling was not demanding she comply with an unlawful condition, according to Raybon, Schilling was given bad information. She was free to recommend Smith's termination, an investigation be conducted, speak with an attorney, or simply do nothing. Instead, she voluntarily submitted her resignation while she had several options, invalidating the Hobson's choice doctrine. *See In Re Easter Seals Connecticut, Inc*., 345 NLRB 836, 848 (2005) (ruling an employee did not face a Hobson's Choice when she could have spoken with her supervisors about the situation or filed an unfair labor charge at the time.)

C. AFC Showed No Retaliatory Animus in Excluding Hostile Parties From its Political Activities.

Regardless of her previous NLRB activity, AFC is under no obligation to include Raybon in strategy sessions ***supporting*** a bill she was then working actively ***to defeat.*** Holding otherwise would violate AFC's free speech rights. The First Amendment of the Constitution "plainly presupposes a freedom not to associate." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252, 82 L. Ed. 2d 462 (1984). When inclusion of an unwanted party burdens an organizations expressive activity, the organization holds a right "not to associate." *See Boy Scouts*

of Am. v. Dale, 530 U.S. 640, 648, 120 S. Ct. 2446, 2451, 147 L. Ed. 2d 554 (2000). Here, imposing the burden of including individuals actively working to defeat a bill of law on a strategy session to support that law, is *per se* a violation of AFC's right not to associate.

AFC's right to exclude Raybon from its strategy sessions is further highlighted by the fact that, had Raybon been AFC's ***employee*** at the time she was engaging in adversarial social media activity, AFC would have been more than justified in terminating her for insubordination.[8] This is true even if her prior accusations of racism were protected activity. *See, e.g., Mv Transportation, Inc. & Lanita Burgos, an Individual*, 2018 WL 2392900 (May 24, 2018) (dismissing complaint because even though the employee in question "engaged in protected activity, the record evidence establishe[d] that the Respondent would have discharged her for insubordination, irrespective of her protected activity.") (citing *America's Best Quality Coatings Corp.*, 313 NLRB 470, 486-487 (1993); *Medial Gen'l Operations v. N.L.R.B.*, 394 F.3d 207, 212 (4th Cir. 2005) ("Nor does the Act shield against the consequences of insubordinate behavior if the disciplinary act was not motivated by anti-union animus."). Clearly, the NLRA cannot be reasonably construed in a manner to give greater rights to third parties than to employees.

The General Counsel supposes AFC's interactions with Raybon after her resignation were motivated by a retaliatory animus, rather than the obvious pursuit of AFC's advocacy mission. As described above, following her resignation, AFC, through Smith, worked with Raybon multiple times without complaint or incident.[9] GC 48; R. 7; T. 408-09. In fact, just days after Raybon resigned, Smith did attend meetings with Raybon and asked for guidance on future meetings. GC.

[8] AFC's stance over the politician, Hoffman, and the ESA issue were questioned at length by the General Counsel. However, there can be no dispute AFC sincerely believes the politician in question is opposed to AFC goals on ESAs. GC 18; T. 164, 415-16, 442. Even Raybon agreed AFC publicly feuded with Hoffman. T. 627-28.

[9] The General Counsel even introduced evidence showing that when Smith was directly asked if Raybon should be included in certain meetings, ***he did not object***. GC. 47.

43. To this day, Smith and Raybon work without incident on several issues not related to ESAs. T. 629-20.

Other times AFC chose not to work with Raybon and other individuals who were advocating positions contrary to those advocated by AFC. Again, the reasoning is clear. Smith's objection to including Raybon were tied directly to Raybon's political actions directly contrary to AFC's goals. GC. 45; T. 442-43. Similarly, Raybon herself at times excluded Smith and AFC from communications between "coalition" partners. R. 7. This benign and explicable behavior cannot be spun into a finding of retaliatory animus. Rather, the decision to at times exclude Raybon and others from AFC's activities on a particular policy was made for the legitimate and protected goals of AFC. As succinctly stated by Smith, "…I did not think that it was in our interest to have her privy to what specific strategic steps we were going to take in advancing our legislation, when she's currently undermining them." T. 444.

As shown, logically, AFC's actions could not have been in retaliation. In addition, AFC's decisions for whom to involve in specific policy advocacy efforts are constitutionally protected actions. The alleged retaliation is both factually unsupported and legally at odds with AFC's constitutional rights.

D. The Alleged Handbook Violations Have Been Cured and/or Are Compliant with Previous NLRB Rulings.

The Consolidated Complaint alleges four of AFC's employee handbook policies are overly broad or discriminatory. AFC has amended two policies, its Confidentiality policy and Distribution of Literature policy (collectively the "Amended Policies") as reprinted above and included in General Counsel Exhibit 7. GC. 7. The newly amended policies were written to conform with

previous NLRB decisions.[10] *See Argos USA LLC d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26 (Feb. 5, 2020) (stating a confidentiality agreement limited specifically to a company's proprietary business information does not interfere with the exercise of Section 7 rights); *see also Medic Ambulance Serv., Inc. & United Emergency Med. Servs. Workers, Local 4911, AFSCME, AFL-CIO*, 370 NLRB No. 65 (Jan. 4, 2021) (stating, "[t]he Board has long recognized the principle that '[w]orking time is for work,' and thus has permitted employers to adopt and enforce rules prohibiting solicitation during 'working time,' absent evidence that the rule was adopted for a discriminatory purpose.") Given none of the allegations by the General Counsel have even a remote connection to either of the Amended Policies, any allegation these policies were flawed are moot. The remaining unchanged policies, AFC's Equal Opportunity Employer statement and its "Open Door" policy (collectively the "Disputed Policies") are not only lawful policies supported by business justifications, but they are also directly for the benefit of AFC's employees.

To succeed on a claim that an employer's handbook infringes on the exercise of rights protected by Section 7 of the Act, the employer's handbook, when reasonably interpreted, must have an adverse impact on employees' rights and that this adverse impact outweighs the justifications associated with the rule. *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017); *Strongsteel of Alabama, LLC & Tony Mcginty & Eric Bracewell*, 367 NLRB No. 90 (Feb. 13, 2019).

As reprinted above, the two policies in question here direct an employee that is subject to some form of discrimination or an employee with another workplace concern to contact ***someone*** at AFC with authority so that any unlawful or harmful behavior could be addressed.[11] Notably,

[10] While AFC does not concede its previous policies were in violation of the Act, it has amended the policies to more closely conform to previous Board decisions on these issues to avoid any confusion or further dispute.

[11] The "Open Door" policy also references that an employee is free to ask any questions concerning the policies themselves.

both policies give multiple options for the suggested communication at the discretion of the employee. Here, Raybon did discuss her complaints about Smith with several employees including Rust and Miller, without even a warning she was violating the handbook. T. 249, 304. However, when Raybon harassed fellow employees after drinking with allegations "Steve is a racist," she was lawfully told this behavior was unprofessional and violated AFC's policies.

The justifications associated with the Disputed Policies are plain. In order to address the needs or complaints of its employees AFC needs to be made aware of them. The General Counsel defies explanation by suggesting policies that explicitly state the organization wants ***to prevent*** unlawful activity can somehow be read ***to endorse*** such behavior. This policy goal is endorsed by the NLRB which has previously ruled that policies forbidding "illegal discrimination or harassment" from "go[ing] unreported" cannot reasonably be read to encompass Section 7 activity. *TU Electric*, 27 NLRB AMR 37029 (1999); *See also In Re Easter Seals Connecticut, Inc.,* 345 NLRB 836, 838 (2005)(stating a handbook policy requiring employees to take unresolved complaints to a supervisor "does not interfere with the employees' statutory right to discuss, among themselves, their terms and conditions of employment.")

Therefore, the policy in question which states an employee "should" report possible discrimination to their supervisor or another authority cannot reasonably be read to have an adverse impact on employees' NLRA rights, especially when considered with the plain benefit of such a rule. Given the Amended Policies have addressed any possible issue with the previous versions of these policies and those policies are not alleged to have resulted in any specific violation, those alleged violations should be dismissed as moot. The remaining Disputed Policies are lawful attempts to know of discrimination or harassment and are permitted policies as a matter of law.

CONCLUSION

For all of the above reasons, AFC respectfully submits that the Consolidated Complaint should be dismissed in its entirety.

Dated: April 9, 2021

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that on the 9th day of April 2021, a copy of the foregoing Brief was filed through the Agency's web portal with service to the parties as follows:

Via First Class Mail to:

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/s/
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